NO. 16371

IN THE

United States
Court of Appeals
For the Ninth Circuit

WAYNE JOHNSON, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court
for the District of Arizona

BRIEF OF APPELLEE

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STATEMENT OF FACTS

This appeal arises by reason of the denial by the United States District Court for the District of Arizona of the appellant's Petition under 28 U.S.C. § 2255 to vacate and set aside a judgment of conviction and sentence of life imprisonment imposed by the District Court in January, 1957.

On September 15, 1958, the District Court held a hearing on the Petition of the appellant to vacate and set aside his conviction and sentence. The appellant appeared in person, represented by appointed counsel, and evidence was offered by both the appellant and the Government.

The evidence, viewed in the light most favorable to the prevailing party (*Paramount Pest Control Service* vs. *Brewer,* 9 Cir., 177 F. 2d 564), shows that the appellant was indicted for murder in the first degree in October, 1956 (TR (Transcript of Record) 1). Named with the appellant as co-defendants were two others, Leroy Lewis and Burton Lopez (TR 1). Appellant Johnson was represented by Harold Kautz, an attorney employed through appellant's mother. The other defendants were represented by Court-appointed counsel (TR 3, TP (Transcript of Proceedings) 3).

The appellant and co-defendants were arraigned on October 22, 1956, and each of them entered a plea of not guilty to the indictment (TR 3). Thereafter, the attorney for the appellant, Mr. Harold Kautz, undertook to learn all that he could about the facts of the case. He had conferred with the appellant prior to arraignment and he continued to confer with the appellant from time to time thereafter. The total time taken up by these interviews with the appellant occupied some six to eight hours (TP 30). In addition, Mr. Kautz conferred with Mr. Ragan and Mr. Rodgers, attorneys appointed by the Court, to defend the co-defendants, Leroy Lewis and Burton Lopez (TP 31). These conferences with the attorneys for the co-defendants were undertaken to determine their expected testimony (TP 31).

In addition to conferring with the attorneys for the co-defendants, Mr. Kautz also conferred with the Assistant United States Attorney handling the case for the Government (TP 32), and the Government's attorney showed Mr. Kautz copies of the statement given by the appellant to the Federal Bureau of Investigation (TR 32, Ex 1) and the statement given by the co-defendant, Leroy Lewis, to the Federal Bureau of Investigation (Ex 2, TR 35).

After the interviews with the appellant, the conferences with the various attorneys, and examination of the statements made by the appellant and the co-defendants, it was the professional opinion of Mr. Kautz that there was a strong possibility that the appellant might be convicted of murder in the first degree, and in such event it was entirely possible that a verdict of death would be given by the jury (TR 34). It was Mr. Kautz's opinion that the appellant's version of the events that he had invited the deceased over to the automobile, knowing that the others intended to take him out on the desert and beat him up, was sufficient to involve the appellant Johnson in the actions of the others. Mr. Kautz advised the appellant to plead guilty to murder in the second degree.

Mr. Kautz advised the appellant that the maximum punishment for second degree murder was life imprisonment (TP 25 and 34), but he also advised the appellant that he could get anywhere from life to ten years (TP 25).

On December 10, 1956, the appellant Wayne Johnson appeared before the Court, together with a co-defendant, Leroy Lewis, and both withdrew their pleas of not guilty and entered pleas of guilty to murder in the second degree (TR 11). The Court specifically advised the appellant Johnson that he could be subject to a life penalty, and the appellant stated that he understood that this was a fact (TR 8).

The sentencing of appellant took place on January 28, 1957, at which time appellant and co-defendant Leroy Lewis were sentenced to life imprisonment (TR 13 and 18).

ISSUE PRESENTED

The issue presented by this appeal is whether the findings of the District Court that the appellant was

represented by competent counsel and entered a voluntary plea of guilty to a criminal charge are supported by competent evidence.

ARGUMENT

The statute under which appellant seeks relief reads in part:

28 U.S.C. § 2255.

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

☆ ☆ ☆ ☆

Pursuant to the requirements of the above section, the District Court held a hearing, made findings of

fact and conclusions of law, and after considering the evidence the Court denied the appellant's Petition.

The remedy provided by Title 28 U.S.C. § 2255 is a special civil proceeding rather than a criminal proceeding, and the burden of establishing a basis from relief under one or more of the grounds set forth in the section is upon the petitioner.

Hastings v. *United States*, 9 Cir., 184 F. 2d 939, 940

Taylor v. *United States*, 229 F. 2d 826

United States v. *Trumblay*, 234 F. 2d 273, 275

On appeal the findings of the District Court in civil proceedings will not be set aside unless they are clearly erroneous.

Paramount Pest Control Service v. *Brewer*, 9 Cir., 177 F. 2d 564

Rule 52, Federal Rules of Civil Procedure

The appellant's main contention seems to be that he was represented by incompetent counsel, so in effect he was deprived of counsel contrary to the Sixth Amendment to Constitution of the United States. But mere dissatisfaction with the results obtained through the efforts of an attorney is insufficient to invoke the protection of the Sixth Amendment to the Constitution.

Kinney v. *United States*, 177 F. 2d 895, 897

In considering the contentions of the appellant, it must be pointed out that his conviction came about by his plea of guilty.

". . . While the accused may have to take the consequences of a poor defense, he may at least say the fault was not his own. But this is not so when he pleads guilty. Here the deed is his own; here there are not the baffling complexities which require a lawyer for illumination; if voluntarily and understandingly made, even a layman should expect a plea of guilty to be treated as an honest confession of

guilt and a waiver of all defenses known and unknown. And such is the law. A plea of guilty may not be withdrawn after sentence except to correct a 'manifest injustice,' and we find it difficult to imagine how 'manifest injustice' could be shown except by proof that the plea was not voluntarily or understandingly made, or a showing that defendant was ignorant of his right to counsel. Certainly ineffective assistance of counsel, as opposed to ignorance of the right to counsel, is immaterial in an attempt to impeach a plea of guilty, except perhaps to the extent that it bears on the issues of voluntariness and understanding."

Edwards v. *United States,* 256 F. 2d 707, 709

But was Mr. Kautz, appellant's counsel, actually ineffective? Even viewing the matter with hindsight, the Government contends that Mr. Kautz acted diligently and faithfully throughout his representation of appellant, and his effectiveness may be judged by the fact that he saved appellant from a very possible death sentence.

When Mr. Kautz was employed, appellant had already given a very damaging statement to the Federal Bureau of Investigation (TR 32, Ex 1). By conferring with counsel for the co-defendants, Mr. Kautz learned that the others were blaming appellant for the most serious elements of the crime (TP 33, TR 28, Ex A). These co-defendants had given statements to the Federal Bureau of Investigation, and Mr. Kautz contacted the United States Attorney's office to see these statements (TP 32, Ex 2, TR 35).

Mr. Kautz conferred with appellant several times for a total of six or eight hours (TR 30). What was said is not known since the appellant asserted the privilege of attorney-client (TP 27-29). The appellant states that he lied to his attorney, Mr. Kautz (TP 17), by telling him that the deceased had been called to

appellant's car by the appellant himself (TP 11). This was important because the trend of the evidence seemed to be that those with appellant wanted to take the deceased out in the desert and beat him. But appellant admits that he knew the others wanted to fight the deceased.

Q And that you were induced to turn around and go get Willard Dean Antone?

A Yes, I was talked into it.

Q You were talked into it?

A Yes.

Q You knew that the boys wanted to fight him, or hurt him?

A Yes.

Q But you then drove back to the Last Chance Tavern?

A I drove back just to satisfy these guys that wanted to pick him up.

Q Right.

A And going back, I didn't have no intention of picking the guy up.

Q He got into the car?

A Yes.

Q You say you told your lawyer that you called him over?

A Yes, I told him.

Q But that isn't really what you meant. Did you call him over?

A No, I didn't call him.

Q But you told your lawyer you called him over?

A Yes.

(TP 15-16)

It appears that appellant actually did call the deceased to the car.

This first beating was not the last of the incident, for, after appellant and his companions left the deceased in the desert, they returned to the deceased where the last and fatal beating took place (TP 17, TR 32-35, Ex 1 and 2).

Mr. Kautz, in representing the appellant, represented the only adult in the case, for the co-defendants were each 17, and the two other individuals in the case were 15 years of age (TP 14-15). The appellant was 27 years old at the time (TP 15).

Mr. Kautz knew that the Government did not need to rely on appellant's confession because the testimony of the co-defendants could be used against appellant plus that of the 15-year olds who were already serving their term in the Federal Institution for Juveniles (TR 16).

Appellant makes much of Mr. Kautz's statement (TP 37) that he was satisfied the Government had evidence that appellant had a substantial part in the events leading up to the death of the deceased, but as to the proof he could not say. The Government believes that Mr. Kautz's statement should not be construed to mean that he doubted whether the Government could prove the appellant's participation in the crime. The question to Mr. Kautz was whether the Government had proof of appellant's *substantial* participation in the death of the deceased. Mr. Kautz throughout was convinced that appellant could be convicted as an aider and abettor (TR 29, Ex A) for his part in the crime. Mr. Kautz in using the word "proof" meant the word in the sense of the final conclusion drawn from evidence, and in this sense he could not say positively whether the jury would find one way or the other, but Mr. Kautz already testified as to the probabilities facing appellant, namely, a death penalty (TP 26, 34).

Considering all the evidence which was available against appellant, Mr. Kautz advised the appellant to plead guilty to murder in the second degree. The Government contends that the whole record not only fails to show that Mr. Kautz was incompetent, but on the contrary the record shows the workings of a diligent and faithful counsel.

One point remains to be discussed, and that is whether the appellant was misled as to the sentence he could receive for his plea. There is a dispute in the evidence as to what appellant was advised by his counsel concerning the term of sentence. Appellant claims that he was told by Mr. Kautz that he would probably not get more than 10 years (TP 5).

At the time the appellant changed his plea, the District Court specifically warned appellant that he could be given a life penalty (TR 8). The fact that appellant may have ignored the warning is not a matter to complain of now.

The most important fact which marks appellant's testimony a callous lie in this whole matter is the fact of the efforts that his counsel Mr. Kautz was going to try to arrange for a so-called "truth serum test." What was the purpose?

> THE WITNESS: We had a stipulation orally between myself and the U. S. Attorney that after the plea of Guilty to second degree murder, we would be privileged to have the truth serum tests made for what effect they would have on the sentence.
>
> (TP 47-48)

Again Mr. Kautz states:

> Q What is your recollection as to what you told him you thought he could get? Not "could", but "would" get?
>
> A Well, from Life, I would say, down to ten years. It was very hard to determine, because there were

> some horrible elements in the crime, which it was just a question of whether we could convince the Probation officer or the Court that Wayne had not had a part in. (TP 37)

The District Court by his findings showed that he believed Mr. Kautz rather than appellant, and the Government contends the evidence in record supports the position of the District Court.

Appellant admits that he knew that he was pleading guilty to second degree murder (TP 23). The exhibit offered in support of his petition (Ex A) shows appellant's understanding of his plea:

> Since Wayne was the eldest of the Defendants, and since the other accused repeatedly blamed Wayne for the most serious elements of the crime, the federal attorney refused to consider any reduction in plea for Wayne other than second degree murder. Since this avoided the death penalty, I discussed the matter in detail with Wayne, and he decided he would plead guilty to second degree murder, although several times he asked me to see if we could secure agreement to any less charge. (TR 29-30)

CONCLUSION

Appellant was represented by competent counsel at the time of his plea of guilty and at the time of sentence. If his counsel was acting on any misinformation as to the amount of appellant's participation in the crime it was the fault of appellant in lying to his counsel, and appellant cannot now be heard to complain.

The whole record shows that appellant knew and understood the meaning of his plea of guilty to second degree murder, and the record supports the position

of the District Court that appellant understood the possible consequences of his plea of guilty.

Respectfully submitted,

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